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No. 99-1277

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1999

PHILIP MORRIS, INCORPORATED, ET AL.,

Petitioners,

v.

HOWARD A. ENGLE, M.D., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Florida District Court of Appeal for the Third District

---

RESPONDENTS' FLORIDA ENGLE CLASS OBJECTION TO MOTION OF CHAMBER OF COMMERCE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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OBJECTION TO MOTION OF CHAMBER OF COMMERCE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Respondents, the Florida Engle Class recognize that *amicus curiae* briefs are regularly filed before this Court. However, under the circumstances of this case, the Class suggests that leave to file the *amicus* brief of the Chamber of Commerce, should be denied.

A. The Proposed Partisan *Amicus* Brief Should Be Excluded Where the Petitioner Tobacco Companies are Members of the *Amicus* Chamber of Commerce and Provide Financial Support to the Chamber.

The Chamber of Commerce discloses at *footnote 1* of its proposed *amicus* brief:

> No counsel of any party authored any part of this brief, and no person or entity, **other than the *amicus curiae*, its members,** and its counsel, made a monetary contribution to the preparation and submission of this brief [emphasis supplied].

The Petitioner tobacco companies, Philip Morris, Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., for itself and as successor to the American Tobacco Company and Lorillard Tobacco Company/ Lorillard, Inc., are members of the Chamber of Commerce of the United States. Thus, Petitioners did provide monetary contributions toward the preparation and submission of the brief in support of themselves. At a minimum, the *amicus* Chamber of Commerce of the United States should disclose all payments paid to the Chamber by its member tobacco companies during the past several years, including any special payments or contributions in connection with this Supreme Court *amicus* submission. Supreme Court Rule 37.6 requires full disclosure from litigants as to all financial contributions provided for the preparation or submission of an *amicus*

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brief. *The Analysis of the 1977 Revisions of the Supreme Court Rules* in *Supreme Court Rules: The 1997 Revisions* (Robert L. Stern, et al., 1999) discusses Rule 37.6 and this very situation and suggests to litigants:

> . . . [I]f a party to a proceeding is also a member of an organization that is filing an *amicus* brief, should that fact be disclosed? Or if such a party makes a monetary contribution to the preparation or submission of the brief beyond that of other members of the organization, should that fact be disclosed? The Clerk's view, though not dictated by the terms of Rule 37.6, is that the prudent lawyer should disclose the facts in those two situations.

Id. at 6-7.

The extremely close alliance that exists between the *amicus* Chamber and the Petitioner tobacco companies is reflected by the joint industry advertising campaign between the tobacco industry and the United States Chamber of Commerce in May, 1998, that was aimed at defeating smoking legislation that was pending in Congress at that time. The Class previously advised the Supreme Court of Florida of the existence of the joint advertising campaign between the Chamber and the tobacco industry when the Chamber of Commerce filed a very similar motion to file a brief *amicus curiae* before the Supreme Court of Florida, on different issues. The *amicus* motion by the Chamber of Commerce was denied by the Florida Supreme Court on December 8, 1999. *See* Appendix ("App.) 1. The front page story of the *New York Times* on Friday, May 22, 1998, *Industry Ad Campaign Helps Stall Tobacco Bill*, was submitted to the Florida Supreme Court and provides in part:

> The tobacco lobby has pulled off a surprising public relations coup, and won a round on Capitol Hill today, thanks in part to the televised image of a harried, sweaty waitress with earrings the size of onion rings who leans into the camera and says: "I'm no millionaire. I work hard. Why single me out?"

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> That commercial sponsored by the United States Chamber of Commerce, is part of a major advertising and lobbying campaign that has been remarkably successful in turning what tobacco opponents view as a Bill that would discourage teenage smoking into a tax issue and an assault on working stiffs who cannot afford to pay more for cigarettes.
>
> The campaign, by the tobacco industry and its allies, includes the purchase of television time in at least fifty major media markets, and lobbyists on both sides say it was a big factor in the decision today to postpone a Senate vote on the Bill until after Congress returns next month from recess. . . . (emphasis supplied).

See App. 2.

The United States Chamber of Commerce website is replete with its partisan position in favor of its member tobacco companies; the Chamber opposes all state and federal litigation against tobacco companies. Examples of publication by the *amicus* Chamber on tobacco issues has been included in the Appendix. *See* App. 3.

B. The Proposed *Amicus* Brief of The Chamber of Commerce Should Be Excluded Where it Contains a Highly Partisan Presentation of Facts that are Unsupported by the Record and it is Duplicative of the Petition for a Writ of Certiorari Filed by the Chamber's Member Tobacco Companies.

The *amicus* brief presents a complete distortion of the factual record, below. The *amicus* brief is merely a duplication of the tobacco industry's petition for a writ of certiorari and presents a partisan view of the facts that are without support in the record. The Petitioners and *amicus* suggest to this Court that the state courts in Florida have permitted a class member to preside over a statewide class action. However anxious and desperate the Petitioners and the *amicus* may be to capture the interest of this Court to obtain review, the proposed *amicus* brief crosses over all lines of advocacy; there is no excuse for such a distorted and partisan presentation.

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While the role of an *amicus* may have shifted slightly over the years from that of a totally disinterested "friend of the Court", the role has not changed that dramatically that an *amicus* brief may now present a partisan distortion of the facts to assist its member companies. What is so objectionable in the *amicus* brief, and reason alone for excluding same, is that there exists no semblance of neutrality or objectivity.

Judge Robert P. Kaye who presides over the Engle class action is not a class member. Judge Kaye has never been a class member. Florida law prohibits a presiding judge from challenging or passing on the truth of allegations contained within a motion for recusal or disqualification that is filed under Fla. R. Jud. Admin. 2.160(f) and Section 38.10, Florida Statutes. *See Barwick v. State*, 660 So. 2d 685 (Fla. 1995), *cert. denied* 133 L. Ed. 2d 766 (1996); *Fischer v. Knuck*, 497 So. 2d 240 (Fla. 1986); *Rogers v. State*, 630 So. 2d 513 (Fla. 1994); *Dragovich v. State*, 492 So. 2d 350 (Fla. 1986).

The tobacco companies filed an untimely motion for disqualification, relying on Internet news reports published several years prior to the disqualification motion, that question whether Judge Kaye had ever smoked cigarettes. The motion to disqualify was clearly untimely under Florida law. Fla. R. Jud. Admin. 2.160(e); *Rivera v. State*, 717 So. 2d 477, 481 (Fla. 1998); *Guzman & Co. v. British Realty & Mortgage Corp.*, 699 So. 2d 842 (Fla. 3d DCA 1997), *rev. denied*, 709 So. 2d 543 (Fla. 1999). The motion to disqualify was speculative, legally insufficient and without any factual basis in the record. Had Judge Kaye declared the obvious -- that he is not a class member and has no financial interest in the case, Judge Kaye would have been automatically disqualified under Florida law

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since he would be improperly passing on the truth of the allegations.[1]

The motion to disqualify was denied by the trial court and pursuant to Florida law, the trial judge did not state and could not state that he had no financial interest in the case and was not a class member. The tobacco companies filed a petition for writ of prohibition in the Third District Court of Appeal. The petition was considered by the appellate court and denied. The petitions for rehearing were denied. [2] The *amicus* brief is premised on complete misstatements of the record before the Florida state courts. The Engle class action is presently in trial. Judge Kaye has presided over tobacco litigation since 1991.[3]

The *amicus* brief is also objectionable in that it fails to advise this Court that even at the present time, the trial judge has his hands tied and cannot state on the record that he has no interest in the case; that he is not a class member and has never been a class member. The Petitioner tobacco companies have filed repeated motions to disqualify Judge Kaye under Section 38.10, Florida Statutes and Fla. R. Jud. Admin. 2.160, including motions that are currently pending, in individual tobacco cases that have been filed for injuries sustained from exposure to second hand smoke. The motions to disqualify

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[1]That is precisely why the tobacco companies filed the motion to disqualify -- to place Judge Kaye in this "Catch-22" dilemma.

[2]The tobacco companies filed a motion to supplement the record, submitting a copy of an Associated Press article where a media consultant for the Dade County Courts had purportedly stated to a reporter that Judge Kaye had quit smoking cigarettes over forty years earlier and that the trial judge was not a class member. This report, if accurate, further negates the tobacco companies' claims of class membership.

[3]*Amicus* and the tobacco companies argue that there have been a series of favorable rulings for the Class, reflecting bias on the part of the trial judge. To the contrary, at the inception of the tobacco litigation, in 1992, Judge Kaye dismissed with prejudice all class action allegations and was subsequently reversed by the Third District Court of Appeal in *Broin v. Philip Morris Companies, et al.*, 641 So. 2d 888 (Fla. 3rd DCA 1994), *rev. denied*, 654 So.2d 919 (Fla. 1995). The record will reflect that the Class has received a large number of unfavorable rulings from the trial court throughout this litigation. Whenever the tobacco industry has been aggrieved, it has been afforded full appellate review.

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in those individual tobacco cases are similarly frivolous and were probably filed to further hamstring the trial court and to enable the *amicus* and its member tobacco companies to argue before this Court that Judge Kaye has never officially denied the tobacco industry's allegations. Under Florida law, any such denial would equate with the trial judge's automatic disqualification in the Cause.

The Class suggests that under these unique facts this Court should consider the reasoning and holding of Chief Judge Posner in *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063-64 (7th Cir. 1997):

> The tendency of many Judges of this Court, including myself, has been to grant motions for leave to file *amicus curiae* briefs without careful consideration of "the reasons why a brief of an *amicus curiae* is desirable," although the rule makes this a required part of the motion. After 16 years of reading *amicus curiae* briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed fashion.
>
> The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such *amicus* briefs should not be allowed. They are an abuse. The term "*amicus curiae*" means friend of the court, not friend of a party. . . .
>
> . . . . The *amicus* brief does not tell us anything we do not already know. It adds nothing to the already amply proportioned brief of the petitioner.
>
> The bane of lawyers is prolixity and duplication, and for obvious reasons is especially marked in commercial cases with large monetary stakes. In an era of heavy judicial case loads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to *amicus curiae* briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal.

The Chamber of Commerce is the antithesis of "objective dispassionate and neutral", as required by the Court in *United States v. Gotti*, 755 F. Supp. 1157, 1159

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(E.D.N.Y. 1991):

> Rather than seeking to come as a "friend of the court' and provide the court with an objective, dispassionate, neutral discussion of the issues, it is apparent that the NY-CLU has come as an advocate for one side, having only the facts of one side at the time. In doing so, it does the court, itself and fundamental notions of fairness a disservice. Chief Judge Aldrich cautioned in *Strasser v. Doorley*, [432 F.2d 567 (3d Cir. 1970], that it "may be thought partially questionable" for the Court to accept an *amicus* when it appears that the parties are well represented and that their counsel do not need supplemental assistance and where the joint consent of the parties to the submission by the *amicus* is lacking.

Here, the *amicus* is erroneously presenting as undisputed "facts", allegations of the tobacco companies that cannot be challenged by the trial Judge under Florida law governing recusal motions. As this Court noted in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) "We examine an *amicus curiae* brief solely for whatever aid it provides us in analyzing the legal questions before us." Here, however, there are no legal issues presented but rather the threshold issue as to whether this Court has jurisdiction to review an interlocutory order in a state court action that is currently in trial. See *Jefferson v. City of Tarrant, Ala.*, 118 S. Ct. 481 (1997). There also exists a fundamental factual dispute as to what the record reflects, below, as to the disqualification proceedings before the trial and appellate courts.

As the First Circuit recognized in *New England Patriots Football Club v. University of Colorado*, 592 F. 2d 1196, 1198 n.3 (1st Cir. 1979), an *amicus* brief should never give "a highly partisan account of the facts" but rather, assist the court on matters of law. The *amicus* should provide "impartial information on matters of law about which there was doubt;" the *amicus* should be "an *impartial* friend of the court - *not an adversary party in interest in the litigation*." *United States v. State of Michigan*, 940 F.2d 143, 164-65

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(6th Cir. 1991), *cert. denied*, 130 L. Ed. 2d 275 (199_). "An *amicus* who argues facts should rarely be welcomed." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970).

The following are a sampling of examples of partisan and unfounded statements from the proposed *amicus* brief that warrant this Court's denial of the Chamber's motion for leave to file brief *amicus curiae*:

> The question presented in the Petition is whether a trial court judge with a direct personal stake in the outcome of this litigation may continue to serve as the presiding judge in a multi-billion dollar class action lawsuit when he is a former smoker, he suffers from illnesses of the type respondents claim were caused by petitioners and his membership in respondent's Class is undisputed.[4]
>
> * * * *
>
> . . . The judge's failure to recuse himself -- effectively sanctioned by the Florida Appellate Courts given their refusal to grant review -- conflicts with the settled law of this court. . . .[5]
>
> * * * *
>
> The Chamber's brief, moreover, details the risk of potential linkage between the judge's personal circumstances and his legal rulings.
>
> * * * *
>
> . . . . However, it [Chamber] has never before participated in a case such as this where, in blatant violation of elemental due process, the judge making decisions regarding a class of possibly over three quarters of a million people

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[4]The trial judge has no interest in the outcome of the class action litigation but under Florida Law cannot refute allegations contained in a motion to disqualify. This factual scenario hardly equates with class membership being "undisputed." As an analogy, where an individual is arrested and refuses to speak to the police until he has conferred with counsel, could the State assert that by Defendant's not challenging the accusations and his arrest, these allegations are "undisputed." Here, the argument and facts are much stronger because trial judges are prohibited from disputing the truth of factual allegations in a motion to disqualify and the issue is that of legal sufficiency. A motion based on equivocal news articles dated several years earlier that came to light only after an unfavorable verdict for the tobacco industry was properly found to be legally insufficient by the circuit and appellate courts of Florida.

[5]The Third District Court of Appeal, contrary to the *amicus* assertion, did review the petition for writ of prohibition on the merits and denied same.

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> and seeking compensatory and punitive damages of more than $200 billion is himself a member of the respondents' class who stands to profit from his own rulings. . . .

Amicus Brief at 2.

> . . . Neither Judge Kaye, respondents, nor the Florida courts have disputed Judge Kaye's illnesses, his status as a former smoker or his membership in the class.

Id. at 3.

> . . . [H]e [Judge Kaye] (like other class members) stands to benefit significantly from the litigation if the pending multi-billion dollar lawsuit succeeds. . . .And Judge Kaye's individual stakes has the potential to be quite substantial. Under respondents' own estimates, each class member would receive an award of $209,000 per person - a per person award figure that would be substantially increased if, as is likely, the class size and the number of successful litigants is reduced.[6]

Id. at 4.

> Indeed, throughout this litigation, Judge Kaye has made a series of decisions that, at a minimum, create the perception of bias, undermining the overarching requirement that decision makers be neutral in both fact and in appearance. Perhaps Judge Kaye's most troublesome decision is the unprecedented bifurcated trial process he has established. . . .[7]

Id. at 7.

> . . . Such a result. . . would create an enormous windfall for the successful class members "who may include Judge Kaye himself". . . .

Id. at 9.

It was not until after a jury verdict favorable to the Class on July 7, 1999 and after the tobacco companies' post trial motions were denied, that these Petitioners sought

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[6]The Chamber, as well as Petitioners, toss around large monetary awards where neither compensatory nor punitive damages has been determined by this jury.

[7]The *amicus*, as did the Petitioner tobacco companies, presents a one-sided description of selected rulings that were adverse to the tobacco companies. Because of those rulings, the motion to disqualify was filed, as well as the petition for writ of certiorari.

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to disqualify the Court suggesting that perhaps in the trial judge's distant past he might have once been a smoker. There has been an improper pyramiding of inferences and assumptions by the *amicus* that are contradicted by the record and present a distorted and partisan picture of the substantive and procedural proceedings below. Were the Chamber's premise accurate, a substantial percentage of the Judiciary in the United States, and probably most male judges over age fifty, would be "disqualified" to preside over tobacco litigation as former or current smokers.[8]

Federal trial judges have repeatedly denied motions for leave to participate *amicus curiae* where, as here, the motion is filed by an ally of the litigants and is duplicative of the arguments presented. *See United Stationers, Inc. v. United States*, 982 F. Supp. 1279, 1288 n.7 (N.D. Ill. 1997), *aff'd*, 163 F. 3d 440 (7th Cir. 1999); *United States v. Ahmed*, 788 F. Supp. 196, 198 (S.D.N.Y. 1992), *aff'd*, 980 F.2d 161 (2d Cir. 1992); *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3d Cir. 1986), ("Where a petitioner's attitude toward litigation is patently partisan, he should not be allowed to appear as *amicus curiae*"); *Liberty Lincoln Mercury v. Ford Marketing*, 149 F.R.D. 65, 82-83 (D.N.J. 1993); *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D.Ill. 1982); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D.Nev. 1999).

The proposed *amicus* brief is a clone of the petition for writ of certiorari and

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[8]Statistically, over eighty percent of males in the trial judge's age group (approximately 69 to 70 years old) were cigarette smokers at one point in their lives. See David Burns, et al., *Cigarette Smoking Behavior in the United States*, in *Changes in Cigarette Related Disease Risks and Their Implications for Prevention and Control, Smoking and Tobacco Control, Monograph No. 8*, (National Cancer Institute, David Burns, et al., ed., 1997). According to the *amicus*, any judge who is a former smoker should be subject to disqualification. The tobacco companies would make that determination based upon whether the industry receives unfavorable rulings. The *amicus* brief clearly advocates judge shopping. *United States v. El-Gabrowny*, 844 F. Supp. 955, 958-59 (S.D.N.Y. 1994) ("Litigants are entitled to an unbiased judge, not to a judge of their choosing. . . Recusal motions should not be allowed to be used as strategic devices to judge shop.").

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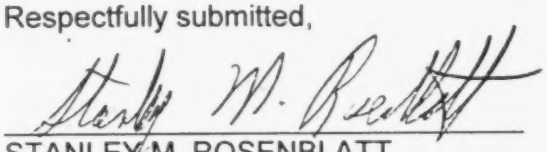
brings nothing new before this Court other than a replay of Petitioners' impassioned arguments. The *amicus* brief does not serve any of the purposes set forth in *Rule 37* and should be denied. Motions for leave to file an *amicus* brief are "not favored" where opposed by one of the parties. Sup. Ct. R. 37.2(b).

CONCLUSION

Respondents, the Engle Florida Class, most respectfully request that this Court deny the motion for leave to file a brief *amicus curiae* for the reasons stated above.

Respectfully submitted,



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APPENDICES

RECYCLED PAPER

1

Supreme Court of Florida

WEDNESDAY, DECEMBER 8. 1999

R. J. REYNOLDS TOBACCO COMPANY, et al.,	*	
Petitioners,	*	
vs.	*	CASE NO. 96,862
HOWARD A. ENGLE, M.D., et al.,	*	
Respondents.	*	

The Motion for Leave to File Brief of Amicus Curiae in Support of Petitioners filed by The Chamber of Commerce of the United States is hereby denied.

DY

cc: Hon. David L. Levy, Judge
Hon. Melvia B. Green, Judge
Hon. Mario P. Goderich, Judge
Hon. Robert P. Kaye, Judge
Mr. Dan K. Webb
Mr. Michael Russ
Mr. Thomas M. Sherouse
Mr. Stanley M. Rosenblatt
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TEST:

Debbie Causseaux

Debbie Causseaux
Acting Clerk, Supreme Court

RECYCLED PAPER

New York Times

FRIDAY, MAY 22, 1998

Printed in Fort Lauderdale

Nationa

Florida: Sunshine temperatures. Hi mid-90's, upper 8 Tonight, warm, l tomorrow. Weath

A commercial from the Chamber of Commerce that casts tobacco legislation as an attack on working people.

Industry Ad Campaign Helps Stall Tobacco Bill

By MELINDA HENNEBERGER

WASHINGTON, May 21 — The tobacco lobby has pulled off a surprising public relations coup, and won a round on Capitol Hill today, thanks in part to the televised image of a harried, sweaty waitress with earrings the size of onion rings who leans into the camera and sighs: "I'm no millionaire. I work hard. Why single me out?"

That commercial, sponsored by the United States Chamber of Commerce, is part of a major advertising and lobbying campaign that has been remarkably successful in turning what tobacco opponents view as a bill that would discourage teen-age smoking into a tax issue and an assault on working stiffs who cannot afford to pay more for cigarettes.

The campaign, by the tobacco industry and its allies, includes the purchase of television time in at least 50 major media markets, and lobbyists on both sides say it was a big factor in the decision today to postpone a Senate vote on the bill until after Congress returns next month from recess. Both sides describe the delay as at least a short-term gain for the tobacco industry.

Scott Williams, a spokesman for the industry, called the postponement "a victory for reality." And Linda Crawford of the American Cancer Society said:

"We've got a stalled bill. If they had really wanted to protect kids and not the tobacco industry, we'd have had a vote today. Their ads have been effective."

One series of television commer-

Continued on Page A21

JEWISH WOMEN/GIRLS LIGHT SHABBAT candles today 18 min. before sunset. In N.Y.C. 7:55 P.M. Info 718-774-2060. Outside N.Y.C. 718-774-3000. In merit of Reizel Gutnick, OBM — ADVT.

Effective Ad Campaign by the Cigarette Industry Helps to Stall the Senate Tobacco Bill

Continued From Page A1

cials sponsored by the tobacco companies uses "man on the street" interviews, of one sentence or less, with real working people who oppose the bill. Another, featuring an exploding cuckoo clock, says: "Washington has gone cuckoo again. Washington wants to raise the price of cigarettes so high there'll be a black market in cigarettes with an unregulated access to kids." The industry's print advertisements say: "Big taxes, big government. There they go again."

One thing the advertisements do not even try to do is buff up the industry's image. "You don't have to like the tobacco industry to have real concerns about where Washington is headed," a print ad says.

The American Cancer Society is running a relatively modest counter-campaign, with a television commercial featuring Dr. C. Everett Koop, former Surgeon General. Shown with the Capitol over his shoulder, Dr. Koop says: "When you see the advertising from the tobacco industry, consider the source. These people are experts at manipulation, and have been lying to the American people for decades."

In addition, the Campaign for Tobacco-Free Kids is running print advertisements in local papers across the country. One in Kansas, for example, says: "Senators Brownback and Roberts: Big Tobacco or Kids? It's time for them to choose. Tobacco vs. Kids. Where America draws the line."

Ms. Crawford, of the American Cancer Society, described the tobacco lobby's current campaign as quite sophisticated. She said the industry had hired a lobbyist for each of the senators, "someone who knows them and how to push their buttons." Mr. Williams, the industry spokesman, denied that but then added, "I would assume the other side has a person assigned to every member as well."

According to the Campaign Study Group's analysis of lobby disclosure records, the tobacco industry has spent about $67 million on lobbying since January 1996. Tobacco opponents say this industry ad campaign alone has cost between $30 million and $50 million. Mr. Williams disputes the larger figure as "way high," without saying how much has been spent.

The bill before the Senate would raise the price of cigarettes by $1.10 a pack over the next five years, give the Government greater regulatory authority over tobacco and require companies to pay penalties if youth smoking did not fall to specified levels.

Some of the most barbed advertising against the legislation has been aimed at its chief architect, Senator John McCain, Republican of Arizona, and is paid for by the National Smokers Alliance, a group that receives financing from the Philip Morris Companies, the Brown & Williamson Tobacco Corporation and the Lorillard Tobacco Company.

Mr. McCain is believed to harbor Presidential ambitions, and among the places where this group's radio advertisements have been broadcast are New Hampshire and Iowa, the states with the early Presidential contests.

In response, the Campaign for Tobacco-Free Kids has sponsored print advertisements praising Mr. McCain.

William D. Novelli, the president of the Campaign for Tobacco-Free Kids, said of the industry: "I don't think they'll lose their pariah status, but they have a couple of points they're scoring with — the tax-and-spend message and the black-market message. They're giving people in Congress cover."

Mr. Novelli and others said tobacco legislation was still likely to pass at some point.

If so, it will not be with the help of the United States Chamber of Commerce, which sees a dangerous precedent in the Government's singling out an industry from which to demand enormous fees.

Bruce Josten of the chamber said delay had been the immediate goal of those who oppose the legislation.

"Debate should continue," Mr. Josten said.

Besides advertising, the tobacco companies have financed so-called grass-roots lobbying activities, urging smokers to call or write their senators. Those smokers who are reached by phone banks sponsored by cigarette makers, or who call the 800 number shown in television ads, are patched through to the senator of their choice. Mr. Williams, the tobacco industry spokesman, said about 130,000 people had called the toll-free number in the last two weeks.

One caller to Senator Tom Harkin, Democrat of Iowa, said the commercial she saw had really hit home.

"They're trying to hurt the little guy, and that's me," that caller, 50-year-old Sandra Scholes of Des Moines, said in an interview. "I'm a baby sitter, and believe me, if I didn't have cigarettes I wouldn't have any hair."

Mrs. Scholes said she earned $75 a week and would be hit hard by higher prices for what she calls her only vice. But having smoked since the age of 16, she said, she does not intend to quit, regardless of the price and despite a heart attack four years ago.

Senator Harkin said his office had also received about 2,500 pre-stamped postcards and 125 petitions in a drive waged by Brown & Williamson. He complained that the petitions, which had been sent to retailers, signed by customers in convenience stores around the country and then mailed to Washington at the expense of the tobacco companies, gave those who signed them the false impression that the mailings were financed by members of Congress: on the back, the petitions said the postage was paid by the addressee.

"This campaign," Mr. Harkin said, "is the most devious I've seen in my 23 years here."

Brennan Dawson, a spokeswoman for Brown & Williamson, described the Senator's complaints as "quite silly."

During the Congressional recess, both sides say, they will continue their lobbying efforts, which, to be sure, were still in full swing today: Ms. Crawford, of the American Cancer Society, said she was on her way back to Capitol Hill for a vote on an amendment that was sure to go against her side. She said of the senators, "I want them to have to feel guilty when they look at me."

RECYCLED PAPER

U.S. Chamber of Commerce
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Media Relations Department (202) 463-5682

NEWS

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FOR IMMEDIATE RELEASE
Wednesday, June 17, 1998

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U.S. CHAMBER DECLARES VICTORY ON TOBACCO BILL

Ads, Lobbying Effort Kills Trial Lawyer Tax Increase

WASHINGTON, D.C. –U.S. Chamber of Commerce President and CEO Thomas J. Donohue declared victory tonight in effectively derailing the Senate tobacco bill.

"Under the guise of stopping teen smoking, this bill became a smokescreen for a huge tax increase, more big government, and a giant bonanza to benefit a handful of wealthy trial lawyers," said Donohue. "Once the public recognized this, it was only a matter of time before it collapsed of its own weight."

The Chamber, which led the business effort to kill the bill by running television advertisements and an all-out lobbying campaign, thanked Senators who stood-up for business and helped block the bill.

"Clearly, tobacco was just the first industry to face this extraordinary assault," he noted. "But, thankfully, we were able to get the message out to Senators, to our members and to the public."

-END-

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NEWS

FOR IMMEDIATE RELEASE
Monday, May 18, 1998

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TOBACCO BILL: WHO'S NEXT?

U.S. Chamber Launches Ad Blitz

WASHINGTON -- The U.S. Chamber of Commerce announced today that it will begin airing a television ad criticizing the U.S. Senate's tobacco legislation for a massive increase in excise taxes on a single industry and a multi-billion dollar payoff to a handful of trial lawyers.

"Who's next?," said Bruce Josten, Chamber executive vice president, "Raising taxes on 45 million working Americans and small businesses to pay billions to trial lawyers is outrageous."

The Chamber's TV ad (script attached) will begin running on Monday, May 18th.

"This 'tax attack' will not stop with tobacco," said Josten, "Washington will become addicted to this spending and target other industries to fund big government projects. That's why this tobacco tax must be stopped."

He noted that the Senate's tobacco bill would transfer billions of dollars generated on taxes on tobacco sales and businesses to the pockets of a select group of plaintiffs' lawyers.

"Not only does this bill increase taxes on hard working Americans, it also creates 17 federal agencies and represents the largest transfer of wealth to a select group of plaintiffs' lawyers in the history of America," Josten added.

"Business wants to address the serious problem of teen smoking. However, we will not support legislation that uses this issue as a smokescreen to increase taxes on the American people and business," Josten said, noting that current state laws that prohibit the sale of tobacco to minors should be vigorously enforced.

Josten noted a Congressional report that shows 53 percent of tobacco revenues comes from taxes that disproportionately impact people earning less than $30,000.

-END-

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The Tobacco Bill – Another Washington Smoke Screen

By Thomas J. Donohue, President & CEO
U.S. Chamber of Commerce

WASHINGTON – "A custome lothsome to the eye, hatefull to the Nose, harmefull to the braine, dangerous to the Lungs..." said King James I in 1603 of the newly discovered practice of smoking tobacco. Nearly four hundred years later, the question is no longer whether tobacco is bad for your health – there's no question about that! – but how the public should deal with this issue.

Currently, the Senate is debating a bill which would impose drastic regulations on tobacco products – and impose on a legal industry enormous unprecedented fines, marketing restrictions, and requirements that it fund government health programs and services. Originally set out as a compromise deal between the tobacco companies and the 40 states suing them over health care costs, the bill's purported goal is to reduce teen smoking. But like so many other proposals in Washington, there's much more to this bill than meets the eye.

- *The proposed legislation would result in a huge tax increase that would transfer wealth from the cigarette-smoking public to plaintiff's lawyers* . The plan is for a new federal cigarette tax of $1.10, which would nearly double the price of a packet of cigarettes, and fall disproportionately on people earning $30,000/year or less. Added to the billions of dollars in fines and payments to be levied on the tobacco industry, the total pull could approach $800 billion over 25 years. Tens of billions of dollars will likely go to millionaire trial lawyers in the form of fees.

- *It would vastly increase the size and scope of government* . This legislation would require the creation of between 17 and 34 new federal bureaucracies to monitor tobacco use and regulation. Much of the money collected from the $800 billion will go to pet initiatives of the Clinton Administration – plans that have little or nothing to do with teen smoking.

- *This pot of money will soon become addictive to politicians and lead to the same "tax attack" on other industries* . The Administration and some in Congress say that they need to impose a high tax to reduce demand for cigarettes, but they also have grandiose plans for the tax money. If demand actually does drop – which is what the politicians claim is their goal – then one wonders which industry will be next in line to fund pet programs. My prediction: other industries that some deem "politically incorrect" – beer, wine and spirits, fattening food, diesel fuel...the list goes on.

- *The proposal is an open invitation to smugglers* . Certainly people might buy fewer expensive packets of cigarettes, but that doesn't mean they'd decrease their total consumption. International evidence strongly suggests that a black market would quickly develop. For example, in 1993, high-tax Canada saw $2 billion in cigarette smuggling, eventually leading to a tax decrease. Sweden had a similar experience. Smuggling would exacerbate teenage smoking as well, since the black market would be completely unregulated and unconcerned with age provisions.

- *The legislation raises serious constitutional concerns* . For one thing, tax legislation is supposed to originate in the House, not the Senate, which is why so many on Capitol Hill are calling the tobacco tax increase a "price adjustment." But that's not the only odd element.

The legislation also includes a provision that would penalize tobacco companies if teen smoking is not reduced by a specified amount during a

specified period of time for any reason. The companies would be forced to pay a fine and would be open to class-action lawsuits. This is an unusual and legally questionable provision that seems designed to fail (so that it would be even easier to sue tobacco companies in the future).

Finally, the advertising provisions would ban animal characters and require ads to be text in black and white, among other things. But soon after similar restrictions were proposed by the FDA in 1995, a federal circuit court judge in North Carolina ruled that they were unconstitutional. Even a current Federal Trade Commission commissioner wrote last year that there was not a scientific basis for these restrictions.

A targeted educational program to cut teen smoking would be a legitimate and important undertaking. But the proposed tobacco bill is not really about reducing teen smoking. It is a smokescreen that masks a huge consumer tax increase, more government bureaucracy, and the transfer of billions of dollars to a small group of plaintiff's lawyers so they can fund more lawsuits and political activities. All Americans – smokers and non-smokers alike – should oppose this bill.

U.S. Chamber of Commerce | 800-649-9719

Please report broken links to the Webmaster.

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NEWS

FOR IMMEDIATE RELEASE
Tuesday, May 19, 1998

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CHAMBER SAYS TOBACCO DEAL AWARDS PLAINTIFF'S LAWYERS - HURTS HARD WORKING AMERICANS

WASHINGTON -- The U.S. Chamber of Commerce said today at a Capitol Hill press conference with U.S. Senators that it remains opposed to a tobacco legislation that broadens the scope of the government and increases taxes on Americans to fund a multi-billion dollar payoff to plaintiff's lawyers.

Lonnie P. Taylor, Chamber senior vice president, said, "Raising taxes on 45 million working Americans and small businesses to pay billions to trial lawyers and expand the federal government is unacceptable and outrageous."

He noted that the Senate's tobacco bill could result in the transfer of billions of dollars generated by taxes on tobacco sales and businesses to the pockets of a select group of plaintiffs' lawyers.

"This industry specific 'tax attack' will not stop with tobacco," said Taylor, "Washington will become addicted to this spending and plaintiff's lawyers will use their new found billions to finance attacks on other industries that may fall out of political favor. This tobacco tax must be stopped."

Taylor added, "Business wants to address the serious issue of teen smoking, and we believe current laws, in all 50 states, should be vigorously enforced. However, we will not support legislation that uses this issue as a smoke screen to increase taxes on business and working Americans."

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

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U.S. Chamber of Commerce
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NEWS

FOR IMMEDIATE RELEASE
Friday, June 12, 1998

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U.S. CHAMBER PRESIDENT BLASTS TOBACCO BILL IN LETTER TO SENATE

"No Amendments To This Bill Would Make It Acceptable"

WASHINGTON, D.C. –U.S. Chamber of Commerce President and CEO Thomas J. Donohue, in a letter to all Senators, called the tobacco bill unredeemable and urged them to kill it by voting against any cloture motion to end debate.

He said the bill was no longer about teen smoking and instead had become "a huge smokescreen" covering hundreds of billions of dollars in tax increases, more big government and a huge bonanza for a small group of wealthy plaintiff attorneys.

Donohue said, "We wish to make it very clear that no amendments to this bill would make it acceptable to the U.S. Chamber and the millions of businesses we represent."

The letter also states that the Chamber intends to score tobacco bill votes in rankings of Senators. Donohue also said the Chamber would continue airing its powerful TV advertisement against the legislation next week.

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NEWS

FOR IMMEDIATE RELEASE
Wednesday, September 22, 1999

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United States Chamber of Commerce Condemns Justice Department Tobacco Lawsuit

WASHINGTON, DC -- The United States Chamber of Commerce today condemned the Department of Justice for filing a massive lawsuit against the tobacco industry, saying it represents an unlawful tax increase and an assault on all businesses, shareholders and consumers.

"No business can feel secure in the United States when the enormous power of the Justice Department can be unleashed against them for the purpose of raising revenue and scoring political points," Chamber Executive Vice President Bruce Josten said. "This is nothing more than taxation through litigation.

"We believe this is a government sponsored assault on the shareholders of legal industries and consumers of legal products," he added. "This is a very dangerous precedent threatening all legal but politically unpopular businesses. What we're asking is: Who's next?"

Josten noted that President Clinton is making good on his pledge in the State of the Union address to use the Department of Justice to sue the tobacco industry in order to fund government programs.

"In the Clinton Administration politics has clearly taken precedence over the rule of law," Josten warned. "it is stunning the hypocrisy of government suing for veterans' health costs when it gave billions of free cigarettes to soldiers."

Last year, the Chamber helped persuade Congress to reject a massive tax on tobacco as unwise and unnecessary.

The Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

END

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